83-1437

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,

Petitioners

v.

ALFRED W. CHESNY, individually and as Administrator of the Estate of Steven Chesny, deceased,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This matter arises out of a lawsuit commenced in the United States District Court for the Northern District of Illinois on October 5, 1979. The suit involved the shooting death of respondent's son by petitioners responding to a call concerning a disturbance in the respondent's son's home in the Village of Berkeley, a municipal corporation in Cook County, Illinois.

On November 5, 1981, 25 months after the commencement of this case, petitioners submitted an offer of judgment which read as follows:

> "Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorneys' fees, of $100,000."

Respondent did not accept the offer.

Over six months later, on May 11, 1982,

the jury returned a verdict in favor of respondent in the amount of $60,000. The respondent, by Post-Trial Motion, requested $171,000 in attorneys' fees for all work done in the case. After some discussion with petitioners, respondent, in good faith, agreed to set the pre-offer portion of fees at $32,000. At that point, petitioners argued to the District Court, inter alia, that the post-offer portion of fees should be disallowed because of the operation of Rule 68. The District Court ruled in petitioners' favor holding that the term "costs" as found in Rule 68 encompasses and limits attorneys' fees recoverable by a party under the Civil Rights Attorneys Fee Award Act of 1976. Title 42 U.S.C., Sec. 1988, when the judgment obtained is less favorable than the offer. Therefore, Judge Shadur (of the District Court) denied respondent's request for those

attorneys fees which accrued after November 5, 1981, the date of the offer of judgment. The District Court ruled that the judgment respondent obtained was less than the offer of judgment and that he could not recover as prevailing party attorneys' fees accrued after the date of the offer.

The respondent appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. The District Court's decision was appealed on a number of grounds and reversed. The Seventh Circuit found that the Rule 68 Procedural device should not be available for use to abrogate the strong congressional policy of Sec. 1988. It was held, therefore, that "costs" under Rule 68 should not include attorneys' fees under Sec. 1988.

Petitioners filed a Petition for Rehearing En Banc. In the Petition for Rehearing,

petitioners, for the first time, raised an issue as to respondents fee arrangement with this attorney suggesting that this was a basis for having the broader issue on appeal reheard. As a basis for their position, petitioners alleged that they learned of the fee arrangement for the first time during oral argument. In fact, respondent alluded to his contingent fee arrangement in his post-trial petition requesting attorneys' fees, of which petitioners were served a copy. Judge Shadur, in his November 16, 1981 Memorandum Opinion and Order, took note of the language in the affidavit of respondent's counsel referring to his contingent fee arrangement.

REASONS FOR DENYING THE WRIT

A. The Seventh Circuit properly found that Rule 68 should not operate to abrogate the sound congressional policy evinced in the Civil Rights Attorney's Fee Award Act of 1976.

B. The Advisory Committee on the Federal Rules of Civil Procedure is currently proceeding toward revision of Rule 68.

C. This Court will not entertain appeals on issues which were not properly raised before the United States Court of Appeals.

ARGUMENT

A. The Seventh Circuit Properly Found That Rule 68 Must Not Operate to Abrogate the Substantive Congressional Policy Evinced in the Civil Rights Attorney's Fee Award Act of 1976.

As the Seventh Circuit aptly stated in holding that Rule 68 does not operate to limit post-offer of judgment attorney's fees:

> "[P]rivate attorneys generally should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponents counsel fees should they lose. S.Rep. No. 1011, Supra at 5. By the same token they should not be deterred from good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer. See Note, Supra, 1978 Duke L.J. at 901."

Chesny v. Marek, 720 F.2d 474, 479 (1983).

Adopting a mechanical approach that "costs" in the Civil Rights Attorney's Fees Award Act, 42 U.S.C., Sec. 1988, means the

same as the word "costs" found in Rule 68 for the sake of avoiding confusion, misses the point. The key question is whether the conflicting congressional policies can be harmonized recognizing that it was the legislature, not the Seventh Circuit, that created a special class of private attorneys general.

In fully reviewing the applicable cases, legislative history and arguments, the Seventh Circuit recognized that the policy underlying the fee award of Sec. 1988 was intended to ensure the full vindication of the then existing civil rights. Rule 68 continued to have the same vitality as in cases where attorney's fee award for successful efforts are not available. Petitioners suggest to this Court that the Seventh Circuit has effectively eliminated the most practical facility for the settlement of lawsuits". Petitioners presumably believe,

therefore, that Rule 68 was designed specifically, if not exclusively, to settle civil right cases and no others. In reality the Seventh Circuit, through its decision, has mandated that Rule 68 have the same impact upon both civil rights and non-civil rights cases. Petitioners argue that the Seventh Circuit created a special class of plaintiff's attorneys.

The converse of petitioners' argument is that for Rule 68 to limit attorney's fees recoverable under Sec. 1988 creates a special class of civil rights defense attorneys, giving those attorneys a disproportionately strong weapon to use against civil rights plaintiffs' attorneys. Such power in civil rights defense attorneys has not been sanctioned by any law or policy, whether judicial or legislative. Indeed, it cuts directly against the grain of Sec. 1988.

Petitioners argue further that by virtue of the Seventh Circuit's decision, the class of civil rights plaintiffs' attorneys is unique in that it can never lose in an economic sense. Assuming petitioners mean "prevailing" civil rights plaintiffs' attorneys, such attorneys, in fact, are elevated to an even par with all others whose fees are contingent upon success.[1] Distinction can only be found in the legislature's determination that in order to induce private attorneys' general to vindicate fundamental

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1/ See Dissent of Justices Rehnquist, Burger and Stewart in Delta Airlines v. August, 450 U.S. 346, 378, 67 L.Ed.2d, 287, 308 (1981), "To construe Rule 68 to allow attorney's fees to be recoverable [or limited] as costs would create a two-tier system of cost-shifting under Rule 68. Plaintiffs in cases brought under those statutes which award attorney's fees as costs would find themselves in a much different and more difficult position than those plaintiffs who bring actions under statutes which do not have attorney's fees provisions..."

rights, certain minimum fees for time spent must be guaranteed. It appears, therefore, that petitioners' true objection to the Seventh Circuit decision, in a logical sense, is that it failed to abolish Sec. 1988 entirely.

B. The Advisory Committee on the Federal Rules of Civil Procedure is Currently Proceeding Toward Revision of Rule 68

As noted by the Seventh Circuit in its Opinion, the Advisory Committee on the Federal Rules of Civil Procedure on August 23, 1983, proposed that Rule 68 be revised. The proposed revisions include changes with respect to the payment of attorney's fees. See Preliminary Draft of Proposed Amendments, 93 F.R.D. 337, 353, 361-64 (1983). Public hearings on the proposed revision were scheduled for January 18, 1984 and February 3, 1984.

While the initial proposal may seem contrary to the decision on appeal here, the committee did not have the benefit of the Court of Appeals' decision upon its preliminary draft. Likewise, it may not have considered, as yet, the impact of the proposed changes on attorney's fee statutes, such as 42 U.S.C. Sec. 1988

After the hearings and further changes, the proposed amendments will presumably be submitted to the Judicial Conference of the United States and/or this Court. Because, as petitioners point out in their argument, the case law construing Rule 68 is disjointed, it would best serve the interests of judicial administration at all levels to change or clarify Rule 68 through the aforementioned quasi-legislative revision process.

C. This Court Will Not Entertain Appeals From Courts of Appeals' Decisions When the Question Was Not Properly Raised Below.

In a Petition for rehearing to the

United States Court of Appeals for the Seventh Circuit, petitioners, for the first time, raised the question of whether a particular attorney's fee arrangement (herein contingent fee) might have an impact on the question of whether Rule 68 should operate to limit attorney's fees under 42 U.S.C. Sec. 1988 in certain circumstances. Petitioners suggested that a "no" answer to the latter question created an unjust enrichment to some attorneys and therefore necessitates a review of the fee arrangements. Petitioners apparently assumed, therefore, that Rule 68 is an appropriate vehicle for policing attorney's fees arrangements as well as encouraging settlement of cases. Petitioners' assertions are without merit, substantively and procedurally. A true reading of the Petition for Writ of Certiorari discloses that petitioners have, by first raising this question in their Peti-

tion for Rehearing, failed to preserve the question for review by this Court. See San Pedro v. Canon Del Agua Co., 146 U.S. 120, 36 L.Ed. 911 (1892). Even assuming arguendo the substantive validity of petitioners' argument, it is forbidden to use the Petition for Rehearing as an afterthought to raise points overlooked or simply not argued earlier.[2] Anderson v. Knox, 300 F.2d 296 (9th Cir. 1962)

A close reading of petitioners' third argument in the Petition for Writ of Certiorari discloses that petitioners have abandoned their earlier position that the

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2/ Petitioners' assertion that they first learned of the fee arrangement at oral argument is contradicted by their own Brief on Appeal, which included Judge Shadur's Memorandum Opinion and Order of November 16, 1981 acknowledging respondent's counsel's affidavit referring to that contingent fee arrangement.

respondent's contingent fee arrangement has an impact on the question of whether Rule 68 costs should include attorney's fees. Rather petitioners now raise a completely new question before this court, namely, whether respondent's fee arrangement is proper.

The law is well settled that the United States Supreme Court will not decide a point not argued by the parties or passed upon by the court below. DeSylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974, 3 L.Ed.2d 1079 (1959).

Consequently, the denial of the Petition for Rehearing by the Seventh Circuit was well grounded as that court gave full consideration to all relevant issues properly raised before it.

CONCLUSION

The United States Court of Appeals has found that respondent is entitled to receive

post-offer of judgment attorneys' fees under 42 U.S.C. Sec. 1988 regardless of whether the judgment finally obtained exceeds the offer. Such finding was made based on the strong legislative policy underlying Sec. 1988 and should not be disturbed absent further and impending legislation. The Petition for Writ of Certiorari should be accordingly denied.

Respectfully Submitted

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